IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM MAKING REFERENCE TO THE DENIAL OF THE STATE'S MOTION FOR PRELIMINARY INJUNCTION OR TO ANY FACTUAL FINDINGS MADE THEREIN [DKT #2405]

Plaintiff, the State of Oklahoma ("the State"), hereby submits its reply in further support of its Motion *in Limine* to Preclude Defendants from Making Reference to the Denial of the State's Motion for Preliminary Injunction or to any Factual Findings Made Therein ("State's Mot.") (Dkt. #2405) and in response to Defendants' memorandum in opposition to the same ("Defs.' Opp.") (Dkt. #2479).

As set forth in the State's Motion, a court's decision regarding a preliminary injunction motion — and its findings of fact underpinning that decision — are not relevant in a subsequent trial for at least two reasons. First, "preliminary injunction proceedings are resolved 'on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'" (State's Mot. at 2 (quoting *Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009)).) Second, the "evidence in a preliminary injunction proceeding is evaluated under a different standard and for a different purpose."[1] (*Id.* at 2.) Accordingly, any reference to the

[1] Specifically, the burden is "heightened" (i.e., greater than the preponderance of the evidence standard applicable at trial) and the purpose is to assess the movant's *likelihood* of

Court's denial of the State's motion for a preliminary injunction, or to any factual findings made therein, would be probative only of the Court's conclusion that the State did not satisfy the burden required for a preliminary injunction. That conclusion and any factual findings relating thereto are irrelevant at trial.

In their Opposition, Defendants acknowledge "the established principle that a district court is not bound by its prior factual findings determined in a preliminary injunction hearing." (Defs.' Opp. at 2.) They agree that "the standards are different for a preliminary injunction than at the trial on the merits." (*Id*. at 3.) And Defendants concede that the State would be prejudiced — and they appear not to challenge the State's Rule 403 argument — in the event of a *jury trial*. (*See id*. at 1-2 (contending that State's Motion is unnecessary *if Court strikes State's jury demand*); *id.* at 2 ("no prejudice will result from reference to the preliminary injunction ruling or factual findings . . . *if the Court grants* [*Defendants'*] *motion to strike the State's jury demand*" (emphasis added)); *id*. ("Mention of the Court's Denial of the State's Motion for Preliminary Injunction During a *Bench Trial* Will Not Result in Prejudice to the State." (emphasis added)); *see also id*. at 3 (arguing absence of prejudice "*when the case is tried on its merits before the same judge who issued the ruling relating to the preliminary injunction*" (emphasis added).)

Because, on August 26, 2009, the Court denied Defendants' motion to strike the State's jury demand, a claim in this case will be tried to a jury. (Dkt. #2527.) Accordingly, Defendants should be deemed to consent to the State's Motion. Even if, however, the Court were to consider the merits of Defendants' arguments directed at the now-foreclosed possibility of a *bench trial without jury issues*, such arguments should be rejected, and the Court should grant the State's Motion.

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success on the merits, not the actual outcome of the case. (*See id*. at 2-3 (quoting Dkt. #1765, Sept. 29, 2008 Opinion and Order, at 4-6).)

Defendants have opposed the State's Motion on the following grounds (while presuming this would be a bench trial): (1) "[t]his Court knows, and cannot ignore its ruling on the State's motion for preliminary injunction, as well as the factual bases for its ruling" and (2) "reference to such ruling will serve as a useful shorthand for all involved in this lawsuit." (*See id.* at 3.)

As to the first ground, the point of excluding irrelevant evidence is to ensure that the trier of fact — be it the Court or a jury — does not consider such evidence.[2] Defendants express their confidence "that the Court will . . . not attribute any undue consideration to its preliminary injunction ruling." (Defs.' Opp. at 3.) However, the Court's ability to ignore irrelevant evidence does not make that evidence admissible. *See* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Indeed, by moving to exclude evidence as irrelevant, the State implicitly seeks a determination that *any* consideration of that evidence would be "undue consideration." Of course, it goes without saying that the only surefire way to prevent *the jury* from considering irrelevant evidence is to exclude that evidence at trial.

As to the second ground, Defendants do not attempt to explain how any reference to the Court's denial of the State's motion for preliminary injunction could possibly serve as a "useful shorthand," let alone an admissible one. (*See* Defs.' Opp. at 3.) Thus, Defendants have not met their burden to "explain what [they] expect[] the evidence to show and the grounds for which [they] believe[] the evidence is admissible." *See Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001). Their inability to do so also illustrates that any probative value of such a

[2] *Cf. FDIC v. Parvizian, Inc.*, 944 F. Supp. 1, 3 (D.D.C. 1996) (stating, in contract case, that court "must *ignore as irrelevant* extrinsic evidence" (emphasis added; internal quotation marks omitted)); *Leaf v. Cottey*, No. 1:02-cv-0433, 2006 U.S. Dist. LEXIS 2960, at *5 (S.D. Ind. Jan. 16, 2006) (stating that Court would admonish counsel and "instruct the jury to *ignore irrelevant evidence*" if parties failed to abide by directive excluding same (emphasis added)).

"shorthand" would be substantially outweighed by the danger of unfair prejudice to the State. *See* Fed. R. Evid. 403.

Finally, Defendants contend that "the State does not dispute that evidence presented during the preliminary hearing is relevant to the trial on the merits" and that, therefore, the Court should "not interpret the [State's Motion] to request that any and all references to the preliminary injunction hearing or evidence presented therein be excluded during the trial on the merits." (Defs.' Opp. at 4.) To avoid any confusion, the State will attempt to clarify the scope of its Motion, as follows.

The State agrees that some of the same evidence presented during the preliminary injunction hearing will be relevant at trial, and the State does not contend that any evidence should be excluded at trial on the basis that the same evidence was offered at the preliminary injunction hearing. (However, evidence is not automatically relevant at trial merely because that evidence was presented at the preliminary injunction hearing, as Defendants intimate.) The State does not move for an order *in limine* to foreclose references to the evidence presented at the preliminary injunction hearing, assuming any such reference is otherwise appropriate (e.g., introducing testimony given at the preliminary injunction hearing).

But Defendants have presented *no* argument for the proposition that references to the denial of the State's motion for a preliminary injunction or any factual findings relating thereto would be relevant at trial. And Defendants appear to concede that any probative value of such evidence would be substantially outweighed by undue prejudice to the State, given that the Court has denied Defendants' motion to strike the State's jury demand.

For the foregoing reasons and for the reasons set forth in the State's Motion, the Court should preclude Defendants from making reference to the fact that the State's Motion for Preliminary Injunction was denied or to any factual findings made therein.

Respectfully Submitted,

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